

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
ISSUED BY PIERCE COUNTY TO
THOMAS O. MURPHY AND
JOSEPH W. NELSON,

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

and

JOHN E. and PATRICIA T. LANTZ,

Appellants/Intervenors,

v.

PIERCE COUNTY, THOMAS O. MURPHY,
and JOSEPH W. NELSON,

Respondents.

SHB No. 84-28

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a shoreline substantial development permit came on for hearing before the Shorelines Hearings Board, Gayle Rothrock, Chairman, Lawrence J. Faulk, Rodney M.

1 Kerslake, Richard A. O'Neal, Nancy R. Burnett, Members, convened at
2 Gig Harbor, Washington, on September 28, 1984. William A. Harrison,
3 Administrative Appeals Judge presided.

4 Appellant Department of Ecology was represented by Jay J. Manning,
5 Assistant Attorney General. Intervenor Patricia T. Lantz appeared and
6 represented herself. Respondent Pierce County was represented by
7 Robin Jenkinson, Deputy Prosecuting Attorney. Respondents Nelson and
8 Murphy were represented by their attorney, Ronald E. Thompson.
9 Reporter Lisa Flechtner recorded the proceedings.

10 Witnesses were sworn and testified. Exhibits were examined. From
11 testimony heard and exhibits examined, the Board makes these

12 FINDINGS OF FACT

13 I

14 This matter arises on Raft Island in Pierce County. Raft Island
15 is the site of a private residential community.

16 II

17 Respondents, Dr. Thomas O. Murphy and Mr. Joseph W. Nelson, own
18 adjacent, waterfront lots on the Island. Dr. Murphy maintains a
19 summer home on his lot. Mr. Nelson is building a permanent home on
20 his lot. Both lots front on Henderson Bay, the opposite shore being
21 about one-third of a mile away.

22 III

23 The lots in question have a long tidal run out. The line of mean
24 low water is approximately 145 feet from the bulkhead.

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IV

The proposed development consists of a joint use dock for mooring the pleasure craft of the two respondents. Dr. Murphy would moor his racing sailboat of 50 feet in length. Mr. Nelson would purchase a boat of comparable size to moor there if this dock is allowed. Such boats would draw approximately 6-1/2 feet of water. The dock is proposed to be 250 feet long, the length necessary to obtain 8 feet of water depth at mean lower low water. This would provide adequate depth for moorage at nearly all tidal conditions.

V

The proposed dock would be located where two lengths of Raft Island beach join at an angle. The beach west of the site, and the site, are composed of gravel. The beach east of the site is composed, predominantly, of mud.

Because the site is on the borderline between these two beach compositions, persons walking the beach west of the site normally turn around at the site. Near-shore recreational fishermen seeking cutthroat trout, which prefer a gravel substrate, would also normally fish west of the site.

VI

Prevailing winds sweep the beach west of the site and would threaten the stability of a dock there. There are no docks west of the site on the gravel beach. There are four docks for pleasure craft east of the site, in close proximity.

VII

The view from the gravel beach west of the site would include the proposed dock. The view would not be substantially impaired by the dock. The dock is proposed to be floating so that its length lies close to the water of inter-tidal area.

VIII

Although there is no public beach or tideland, Island residents customarily walk the beach in the area. As previously found, one would normally turn back at the site to avoid the muddy beach beyond it. However, the floating dock, as proposed, would not be a "fence" as it could be easily crossed over while lying, as it would, on the beach at low tide.

IX

There are numerous mooring buoys in front of homes to the west of the site. These are farther than 250 feet from the bulkheads. Water skiers observing safe practices would ski waterward of the buoy line. Consequently, the proposed dock would not impair water skiing being conducted safely, as is normally the case.

X

The original Pierce County Shoreline Master Program (PCSMP) was approved by the Department of Ecology (DOE) on April 4, 1975. Although not offered into evidence on this record, we take official notice of its terms as set forth in our earlier decision of Kooley and Pierce County v. Department of Ecology, SHB No. 218 (1976). That original master program provided:

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1 Residential docks on salt water, when allowed, shall
2 meet the following design criteria:

3 1. Maximum length shall be fifty (50) feet or
4 only so long as to obtain a depth of eight (8)
5 feet, whichever is less at mean lowest low water.

6 Design Criteria, P. 99 (emphasis added).

7 In Kooley, the proposed development consisted of a pier, dock and
8 float exceeding 50 feet in length (Finding of Fact I). Applying the
9 master program to the proposed development in Kooley, we concluded
10 that 1) a variance was necessary, and 2) Department of Ecology's
11 denial of same was correct. We also stated, however:

12 ...a long, shallow tidal run-out is common in the
13 area, and appellant and others similarly situated
14 must seek relief by virtue of that circumstance
15 through an amendment of the master program itself.
16 That can only be accomplished by the county
17 legislative body with the approval of the Department
18 of Ecology.

19 XI

20 Within one year after Kooley, Pierce County amended its master
21 program to delete the language applied in Kooley. In lieu of that
22 language which prescribes that docks shall have a maximum length of 50
23 feet or obtain a depth of 8 feet whichever is less, the following was
24 adopted:

25 A. Criteria - prior to the granting of a Substantial
26 Development Permit, the County's reviewing
27 authority shall make a determination that the
28 proposed project is consistent with the policies
29 of the Master Program and with the following
30 criteria:

31 1. Important navigational routes or marine
32 oriented recreation areas will not be
33 obstructed or impaired;

2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;
6. The use or uses of any proposed dock, pier or float requires by common and acceptable practice, a Shoreline location in order to function;
7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

B. Development guidelines - In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes.

. . .

. . .

6. Single use piers and docks.

- a. Maximum intrusion into water should be only so long as to obtain a depth of eight feet of water as measured at mean lower low water on salt water shorelines or as measured at ordinary high water in fresh water shorelines except that the

1 intrusion into the water of any pier or
2 dock should not exceed the lesser of 15
3 percent of the fetch or 150 feet on
saltwater shorelines and 40 feet on fresh
water shorelines.

4 65.56.040 GENERAL CRITERIA AND GUIDELINES FOR
5 REVIEWING SUBSTANTIAL DEVELOPMENT PERMITS.
(Amended Res. #19803, June 14, 1977). (Emphasis
6 added.)

7 Department of Ecology approved this amended language on October 26,
8 1977. WAC 173-19-350. This is the language applicable to this,
9 Murphy/Nelson, proposed development.

10 XII

11 The current PCSMP also contains the following pertinent provisions:

12 With regard to joint-use docks:

13 Intent. It is the intent of Pierce County to
14 encourage the construction of joint use or community
15 docks and piers whenever feasible so as to lessen the
16 number of structures projecting into the water. To
17 this end, waterfront property owners are encouraged
18 to explore the advantages of increased dock
19 dimensions which are afforded by the construction of
20 a joint or community use structure. PCSMP Section
21 65.56.020, page 56-2.

22 With regard to buoys:

23 Uses permitted outright: ...

24 b. Anchor buoys limited to one per lot owner or one
25 per 100 feet of shoreline frontage.

26 PCSMP Section 65.56.030A.1.b] and -030B, page
27 56-3 and 4.

XIII

28 On January 3, 1984, respondents Murphy and Nelson applied to
29 Pierce County for a shoreline substantial development permit. On June
30 6, 1984, Pierce County approved such a permit with these conditions:

1 1. The applicants, and their successors in interest as owners or
2 holders of possessory interests in Lots 161 and 165, Raft Island,
3 shall allow use of the facility for moorage of no more than two
4 boats at any one time; and,

5 2. The applicants shall assure that the facility is adequately
6 anchored to prevent the structures from swinging onto neighboring
7 sites.

8 Department of Ecology requested this Board to review that permit by
9 request received on July 5, 1984.

10 XIV

11 Any Conclusion of Law which should be deemed a Finding of Fact is
12 hereby adopted as such.

13 From these Findings the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 Appellants, having requested review, bear the burden of proof in
17 this proceeding. RCW 90.58.140(7).

18 II

19 We review the proposed development for consistency with the
20 applicable (Pierce County) shoreline master program and the Shoreline
21 Management Act (SMA). After the adoption of an applicable master
22 program and its approval by DOE, we do not review a proposed
23 development for consistency with the DOE Guidelines for Development of
24 Master Programs, chapter 173-16 WAC. RCW 90.58.140(2)(a) and (b).

25 III

26 The PCSMP does not require a variance for the proposed
27 development. Both the language of Section 65.56.040(B) and its
28 evolution from earlier language support this conclusion. In direct,

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unbroken sequence following our decision in Kooley, cited above,
Pierce County amended its shoreline master program to delete the
specific standard for dock length and substitute the concept that, "In
lieu of specific standards relating to design, location, bulk and use,
the following guidelines shall be applied...." PCSMP Section
65.56.040B (emphasis added). The purpose of a variance is stated
within WAC 173-14-150 of the DOE:

The purpose of a variance is strictly limited to
granting relief to specific bulk, dimensional or
performance standards set forth in the applicable
master program... (Emphasis added.)

The stated purpose of a variance would be thwarted by applying it to
Pierce County's unspecific guideline rather than a specific standard.
Pierce County has repealed its specific standard for dock length in
order to tailor its decisions to tidal run-outs of varying length.
Dock proposals should be judged by the Pierce County guidelines as
interpreted in Northey v. Pierce Co. and Marshall, SHB No. 84-6
(1984), and not by the rules for shoreline variance. Department of
Ecology v. Pierce Co. and Martel, SHB No. 84-26 (1984).

IV

In Northey, cited above, we concluded that the word "should" is
permissive rather than mandatory in the guideline for joint use docks,
PCSMP Sec. 65.56.040B.7. We concluded, however, that special
circumstances must exist which render a 150-foot dock impractical, and
that a longer dock must have no significant additional adverse impact
before a longer dock can be allowed.

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1 Applying that guideline to this case, we conclude that special
2 circumstances in the form of a long tidal run-out would render a
3 150-foot dock impractical for moorage at the site in question. The
4 proposed 250-foot dock was not proven to have significant additional
5 adverse impact on view, navigation, beach walking or other concerns
6 within PCSMP Section 65.56.040. There should, however, be no mooring
7 buoys associated with these two lots in addition to the proposed
8 dock. There should also be navigation lights marking the waterward
9 end of the dock and these should be as glare free as possible. If so
10 conditioned as to buoys and lights, the proposed development would be
11 consistent with PCSMP Section 65.56.040.

12 V

13 The policies for piers within the PCSMP recite that:

14 (d) Piers associated with single family residences should be
15 discouraged.

16 and

17 (f) Encourage the use of mooring buoys as an alternative to space
18 consuming piers such as those in front of single family residences.

19 PCSMP Use Activity Policies, P. 37 (blue volume). At Page 21 (blue
20 volume) it states:

21 Use Activity policies are a means of guiding types,
22 locations, designs and densities of the future
23 shoreline developments. These general policies are
implemented by the use regulations which are included
in Phase II of the Master Program.

24 The means chosen by Pierce County to "discourage" and "encourage" is
25 therefore the use regulations of chapter 65.56 PCSMP relating to piers

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and docks. Having found consistency between the proposed development
and the use regulations (chapter 65.56 PCSMP) cited by the parties, we
also conclude that there is consistency between the proposed
development and the policies for piers which the use regulations
implement. The meaning of the policies quoted above appears to be
that piers associated with single family residences should be
discouraged where inconsistent with the guidelines for such piers
which are established in the use regulations (e.g., PCSMP
65.56.040B.). Piers associated with single family residences are a
permitted use under PCSMP 65.56.030 of the use regulations.

VII

The proposed development has not been shown to be inconsistent
with RCW 90.58.020.

VIII

Any Conclusion of Law which should be deemed a Finding of Fact is
hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The shoreline substantial development permit granted by Pierce County to Thomas O. Murphy and Joseph W. Nelson is remanded for reissuance in the same form as previously granted but with a condition prohibiting mooring buoys at the lots in question, and requiring glare-free navigation lights at the waterward end of the dock. It is affirmed in all other respects.

DATED: October 4, 1984

SHORELINES HEARINGS BOARD

See Dissenting Opinion
GAYLE ROTHROCK, Chairman

Lawrence J. Faulk 10/3/84
LAWRENCE J. FAULK, Vice Chairman

Rodney M. Kerslake
RODNEY M. KERSLAKE, Member

See Concurring & Dissenting Opinion
RICHARD A. O'NEAL, Member

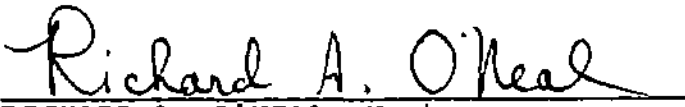
Nancy R. Burnett
NANCY R. BURNETT, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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CONCURRING AND DISSENTING - O'NEAL

Although I concur with the majority of the Shorelines Hearings Board that the permit holders should not be required to obtain a variance, I am unable to find that the review criteria of the Shoreline Master Program are met and, therefore, cannot concur in issuance of the substantial development permit. The degree of impairment to "navigational routes or marine oriented recreation areas" and to the "public use of the surface waters below ordinary high water" is such that it cannot be offset by the increased convenience the dock would provide to its two owners. Denial of the permit to build the subject dock would limit the permit holders no more than nature already has limited all of those lot owners west of the subject property.


RICHARD A. O'NEAL, Member

- DISSENTING OPINION - ROTHROCK

2
3 I disagree with the majority in ordering the reissuance of the
4 subject substantial development permit with only the condition
5 prohibiting mooring buoys at the subject lots. I would remand the
6 permit to Pierce County for review of the permit application for a
7 250-foot, horseshoe-shaped, joint use dock under variance criteria, or
8 alternately, vacate the permit altogether.


9 Appellants represented that a 250-foot floating dock with a
10 horseshoe-shaped, boat tie-up area which penetrates to eight feet of
11 water depth at mean lower low water is the size of dock they find
12 possible to use; that a 150-foot dock or another design is not what
13 the desire. They want the dock on the Murphy-Nelson property line and
14 have not explored locating it further west where it would have fewer
15 impacts. Appellants use other moorage now, apparently without
16 significant inconvenience.

17 The PCSMP, at 65.56.040(B)(7)(a) provides that intrusion into the
18 water of any joint-use pier or dock "...should not exceed the lesser
19 of 15 percent of the fetch or 150 feet on salt water shorelines...".
20 This serves as a length limit which should be upheld unless a dock
21 project can pass the tests of WAC 173-14 variance criteria.
22 Otherwise, there is no good basis for determining whether a longer
23 dock is allowable and truly in the public interest. The Pierce County
24 planning staff and the hearing examiner will struggle to articulate
25 reasonable decisions, supportable in the law and regulations, where
26
27

1 | there are no real standards available to employ in determining whether
2 | permits should issue.

3 | The requirements in the SMA at RCW 90.58.020 and in the PCSMP at
4 | 65.56.040(A) to have permitted projects be consistent with the
5 | policies of the Act and the PCSMP are not met here. These criteria
6 | become the only ones available to a permit reviewer in any joint-use
7 | dock application in Pierce County, unless variance standards are
8 | acknowledged to be a necessary and logical part of the review. Here
9 | the proposed project would impair views of Carr Inlet, would interfere
10 | with the public's use of and access to surface waters (particularly
11 | fishing, boating, and waterskiing), would interfere with beach walking
12 | and adequate alternative moorage and public launching facilities exist
13 | nearby. This dock proposal as set forth in the record made in this
14 | case fails these 65.56.049(A) policy consistency tests.

15 | While Pierce County is known for its marine recreation
16 | opportunities and ample moorage (buoys, marinas, docks), there is
17 | nothing in that reputation compelling a stretching of the PCSMP and
18 | the SMA to entertain, only under substantial development permit
19 | review, oversize docks for very large boats on gently sloping
20 | intertidal areas when there are so many satisfactory and easily
21 | available alternatives and so many potential adverse impacts.

22 |
23 |
24 | 
25 | GAYLE ROTHROCK, Chairman